

2009 WL 6491366 (Ark.App.) (Appellate Brief)
Court of Appeals of Arkansas.

Tania JONES, Appellant,
v.
STATE OF ARKANSAS, Appellee.

No. CACR 08-1124.

June 18, 2009.

An Appeal from the Pulaski County Circuit Court, the Honorable Barry Alan Sims Circuit Judge

Brief of Appellee

Dustin McDaniel, Attorney General By: John T. Adams, Arkansas Bar No. 2005014, Assistant Attorney General, 323 Center Street, Suite 200, Little Rock, AR 72201-2610, (501) 682-8061, Attorneys for Appellee.

***i TABLE OF CONTENTS**

TABLE OF CONTENTS	i
POINTS TO BE RELIED UPON	ii
TABLE OF AUTHORITIES	iii
ARGUMENT	1
CONCLUSION	6

***II POINTS TO BE RELIED UPON**

I.

SUBSTANTIAL EVIDENCE SUPPORTED THE JURY'S GUILTY VERDICT ON THE CHARGE OF ABUSE OF AN ADULT 1

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING THE MOTION OF JOHN W. HALL TO WITHDRAW AS TRIAL COUNSEL 5

***iii TABLE OF AUTHORITIES**

CASES

<i>Bullock v. State</i> , 353 Ark. 577, 111 S.W.3d 380 (2003)	5
<i>Edwards v. State</i> , 338 Ark. 608, 999 S.W.2d 684 (1999)	1
<i>Franklin v. State</i> , 327 Ark. 537, 939 S.W.2d 836 (1997)	6
<i>Norman v. Norman</i> , 333 Ark. 644, 970 S.W.2d 270 (1998)	5
<i>Sales v. State</i> , 374 Ark. 222, 289 S.W.3d 423, (2008)	1
<i>Thomas v. State</i> , 92 Ark. App. 425, 214 S.W.3d 863 (2005)	3
<i>Thorne v. State</i> , 269 Ark. 556, 601 S.W.2d 886 (1980)	6
<i>Williams v. State</i> , 363 Ark. 395, 214 S.W.3d 829 (2005)	1

STATUTES

Ark. Code Ann. § 5-28-101(4)(A)	3
Ark. Code Ann. §5-28-101(5)(A) (Repl. 2006)	2, 4
Ark. Code Ann. §5-28-101(7)(A) (Repl. 2006)	2, 3

Ark. Code Ann. § 5-28-103 (Repl. 2006)	1, 2
Ark. Code Ann. §5-28-103(e)(1) (Repl. 2006)	2
RULES	
Arkansas Rules of Professional Conduct 1.16(b)(6&7)	5

*1 ARGUMENT

I.

SUBSTANTIAL EVIDENCE SUPPORTED THE JURY'S GUILTY VERDICT ON THE CHARGE OF ABUSE OF AN ADULT

A Pulaski County jury found Tania Jones guilty of theft, forgery in the first degree, and abuse of an adult, and then sentenced her to a 12-year prison term for each of these three offenses, to be served consecutively. Jones had worked as an in-home health-care worker for the victim, Della DeLao. For her first point on appeal, she claims that the evidence was insufficient to support the finding that Ms. DeLao was an impaired adult, and that she was exploited, as required by the adult-abuse statute, [Ark. Code Ann. § 5-28-103](#). She preserved the argument for appeal by making and renewing a specific directed-verdict motion at trial, (Ab. 49-51; R. 221-23, 288)

A motion for a directed verdict in a jury trial is treated as a challenge to the sufficiency of the evidence. *E.g. Sales v. State*, 374 Ark. 222, 289 S.W.3d 423 (2008). For the appellate court to affirm a conviction, there must be substantial evidence to support the conviction as viewed in the light most favorable to the State. *Id.* Substantial evidence is evidence that has sufficient force and character that it will with reasonable certainty compel a conclusion that does not rely on speculation or conjecture. *Id.* The appellate court considers only evidence, direct or circumstantial, that supports the verdict. *Id.* Credibility determinations are made by the jury, and this Court does not consider them on appeal. *E.g. Williams v. State*, 363 Ark. 395, 403, 214 S.W.3d 829, 833 (2005). A defendant's improbable explanation of suspicious facts may be admissible as proof of her guilt. *E.g., Edwards v. State*, 338 Ark. 608, 616, 999 S.W.2d 684, 689 (1999).

*2 Jones was convicted of violating [Ark. Code Ann. § 5-28-103](#) (Repl. 2006), which makes it “unlawful for any person or caregiver to abuse, neglect, or exploit any endangered person or impaired person subject to protection under the provisions of this chapter.” “Any person or caregiver who exploits a person in violation of a provision of this chapter when the value of the property, asset, or resource is... (\$2,500) or more, is guilty of a Class B felony.” [Ark. Code Ann. § 5-28-103\(e\)\(1\)](#) (Repl. 2006). The felony information specifically charged Jones with “purposely exploit[ing] an impaired adult, to wit: DELLA DELAO.” (Add. 7; R. 7) Under the statute, an “impaired person” is defined as

a person eighteen (18) years or older who as a result of mental or physical impairment is unable to protect himself or herself from abuse, sexual abuse, neglect, or exploitation, and as a consequence of this inability to protect himself or herself is endangered.

[Ark. Code Ann. § 5-28-101\(7\)\(A\)](#) (Repl. 2006). “Exploitation” includes:

[t]he illegal or unauthorized use or management of an an [sic] adult endangered person's or an adult impaired person's funds, assets, or property or the use of an adult endangered person's or an adult impaired person's, power of attorney, or guardianship for the profit or advantage of the actor or another person.

[Ark. Code Ann. § 5-28-101\(5\)\(A\)](#) (Repl. 2006).

Petitioner asserts that the evidence was insufficient to find that Ms. DeLao was an endangered or impaired adult for the purposes of [Ark. Code Ann. § 5-28-103](#). Petitioner admits that the State proved that the victim Ms. DeLao was over 18 and that that she suffered from a physical defect, but claims that the State did not prove (i) that the victim was in a situation that posed imminent

risk of serious injury or death; (ii) that the victim was unable to protect herself; (iii) that the victim was endangered; or (iv) that any exploitation of the victim occurred.

As an initial matter, the State contends only that Ms. DeLao was an impaired person, not that she was an endangered adult. (Add. 7; R. 7) The Appellant confuses the matter by citing *3 *Thomas v. State*, 92 Ark. App. 425, 214 S.W.3d 863 (2005), where this Court described the burden on the State under the adult abuse-statute this way:

[T]he State needed to present evidence that (1) [the victim] was older than eighteen; (2) that he was in a situation that posed imminent risk of serious injury or death; and (3) that he lacked capacity to comprehend the nature and consequences or [sic] remaining in that situation, or (1) that Kaelin was older than eighteen years of age; (2) that he suffered from mental or physical defect; and (3) as a consequence thereof that he was unable to protect himself.

However, this summary of the State's burden under the adult-abuse statute comes from a case where the alleged victim was an endangered *or* impaired person. *See Thomas*, 92 Ark. App. at 433, 214 S.W.3d 863. Because the State charged Jones only with the exploitation of an impaired person, the Appellant's argument (i)--that the State failed to show that the victim was in a situation that posed imminent risk of serious injury or death--is irrelevant to the case.

This confusion may have also led the Petitioner to make argument (iii): that the State did not present sufficient evidence that the victim was endangered. While the State did not have the burden of showing that Ms. DeLao was an "endangered person" (as defined at [Ark. Code Ann. § 5-28-101\(4\)\(A\)](#)), the State did have to show that Ms. DeLao was "endangered" in the common sense of the term in order to establish that she was an "impaired person" (as defined at [Ark. Code Ann. § 5-28-101\(7\)\(A\)](#)). The record in this case contains ample evidence that the victim, Ms. DeLao, was so impaired. The victim's cousin testified that the victim had serious back and spinal problems, as well as emphysema requiring her to receive oxygen. (Ab. 11; R. 103-4) By the Appellant's own admission, Ms. DeLao required physical therapy, suffered incontinence, and was unable to drive herself. (Ab. 58-59; R. 234-6)

As to Appellant's main arguments--(ii) and (iv)--the State presented sufficient evidence to compel the conclusion that the victim was exploited, in this case by the "illegal or *4 unauthorized use or management of [her] funds, assets, or property," [Ark. Code Ann. § 5-28-101\(5\)\(A\)](#) (Repl. 2006). The State charged Jones with exploitation in the form of misappropriating jewelry and using her access to victim's bank account to make purchases for her personal use. (Ab. 49-50, R. 222) The record shows that in the final weeks of Ms. DeLao's life, Jones used her bank card to make a number of purchases at Wal-Mart. (Ab. 14, 23, 27; R. 111, 156). Ms. DeLao's cousin and executrix testified that Jones made purchases beyond what was necessary to care for Ms. DeLao and her mother, and did not return the bank card after Ms. DeLao's death. (Ab. 21, 23; R. 133, 137)

The State also presented substantial evidence to show that, as a result of her impairment, Ms. DeLao was unable to protect herself from, and was endangered by, the exploitation committed by the Appellant. While the Appellant points out that Ms. DeLao was described by her cousin as competent to manage her affairs (Arg. 3), this avoids the issue of whether Ms. DeLao was able to protect herself from the exploitation specifically charged in this case. The reason that Jones was in possession of the victim's bank card was that the victim was unable to make her own shopping trips. (Ab. 12, R. 107) The reason that Jones was in control of the victim's jewelry is that Jones was responsible for keeping the victim's home and caring for the victim's mother after Ms. DeLao went to the hospital for the last time. (Ab. 13, R. 108) In light of this substantial evidence, the trial court properly denied Appellant's directed-verdict motion on the charge of adult abuse.

Finally, Appellant makes the novel claim that, in the event she prevails in her challenge to her adult-abuse conviction, this Court should remand this case to the trial court for resentencing on her theft and forgery-in-the-first-degree convictions. (Arg. 7) Appellant cites no authority to support this assertion. Because Appellant has not appealed the sentences *5 imposed based on those other two convictions, this Court should not reexamine those sentences as part of this appeal.

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING THE MOTION OF JOHN W. HALL TO WITHDRAW AS TRIAL COUNSEL

For her second point on appeal, the Appellant argues that the trial court abused its discretion by denying the motion of John W. Hall to withdraw as trial counsel. On June 26, 2008, Attorney Hall filed his Defense Counsel's Motion to Be Relieved, arguing that under Arkansas [Rules of Professional Conduct 1.16\(b\)\(6 & 7\)](#)¹ good cause existed, specifically the dissatisfaction of defendant with Hall's advice as to how to proceed in the case.

In [Norman v. Norman](#), 333 Ark. 644, 652, 970 S.W.2d 270, 273 (1998), the Arkansas Supreme Court held that a violation of the Model Rules of Professional Conduct does not automatically compel disqualification; rather, such matters involve the exercise of judicial discretion. In [Bullock v. State](#), the court affirmed the denial of May 4, 2000, motion to be relieved as counsel. 353 Ark. 577, 581, 111 S.W.3d 380, 383 (2003). There, at the time of the May 15, 2000, hearing on the motion, the trial was set for June 19, 2000, and the court ruled that, in the absence of incompetence on the part of the attorney, and given the proximity to the trial *6 date, it was within the discretion of the trial court to deny the motions to withdraw and relieve counsel. 353 Ark. at 581-2, 111 S.W.3d at 383-4. When a defendant has "accepted representation by an attorney...the fact that [she is] dissatisfied with counsel's efforts does not entitle [her] to appointment of a different attorney." [Franklin v. State](#), 327 Ark. 537, 539, 939 S.W.2d 836, 837 (1997). To establish that the trial court abused its discretion in denying the motion, the Appellant must establish that she suffered "identifiable prejudice to [her] case of a material or substantial nature." [Thorne v. State](#), 269 Ark. 556, 559, 601 S.W.2d 886, 889 (1980).

In this case, the trial court's decision was well within the scope of the discretion established for trial court rulings on motions to withdraw as counsel. Defense Counsel's Motion to be Relieved was filed on June 26, 2008, a hearing was held on the motion on June 27, 2008, and the trial was held on July 1, 2008. (Ab. 1, Ad. 47; R. 47, 67, 70) Neither Appellant nor counsel provided a specific reason beyond the general dissatisfaction of Appellant with counsel's advice, and counsel's unwillingness to handle a difficult client, why counsel should be relieved five days before trial. The Petition suggests possible prejudice that may have generally resulted from the denial of the Motion to be Relieved, but brings forth nothing to suggest that she suffered substantial and material, or even identifiable, prejudice. While it is possible, as she posits, that the trial could have been held at a later date or with hypothetical additional defense witnesses, none of the possibilities raised by the Appellant constitute an identifiable disadvantage she suffered in her trial as a result of having Mr. Hall as her trial counsel.

CONCLUSION

The record in this case contains substantial evidence that Appellant Tania Jones exploited Della DeLao, and that Ms. DeLao was impaired under of the Arkansas adult-abuse statute. The trial court therefore properly denied the Appellant's motion for a directed verdict at trial, and this *7 Court should affirm the trial court's decision and the Appellant's conviction for abuse of an adult. Because the trial court did not abuse its discretion in denying the Defense Counsel's Motion to Be Relieved, this Court should affirm the trial court's decision on that motion. Thus, the case should be affirmed in all respects.

Footnotes

- 1 The Rules provide that "a lawyer shall not represent a client or, where the representation has commenced, shall withdraw from the representation of a client if... (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or (7) other good cause for withdrawal exists."